

Modernisation of EU public procurement rules

Summary

Following discussion at the January board meeting, this report updates members on work the LG Group is undertaking to influence revised EU procurement directives expected in late 2011 or early 2012.

Recommendations

Members are asked to discuss the issues highlighted by our member authorities within the LG Group response, consider any further issues which should be incorporated into our lobbying (paragraph 11) and to agree next steps (paragraph 12).

Action

Officers to progress as appropriate.

Contact officer: Dominic Rowles
Position: Policy & Public Affairs Coordinator (Brussels), LG Group
Phone no: 00 32 2502 3680
E-mail: dominic.rowles@local.gov.uk

Modernisation of EU public procurement rules

Background

1. EU procurement rules directly govern how councils buy their supplies and services. All procurements above a certain value (normally £156,442) must follow relatively complex and lengthy EU procedures to ensure providers from across the EU get a chance to compete for councils' contracts.
2. LG Group's work on simplifying procurement rules supports the Group's 'productivity programme' which supports local government efficiencies in the face of budget cuts.
3. This paper follows discussions at the January 2011 European and International Board meeting in Nottingham. As outlined at that meeting, the Group is working with the EU and Whitehall to influence new EU public procurement legislation to be proposed in late 2011 or early 2012. The process of agreeing new rules at EU level followed by implementation into UK law will take several years.
4. The Improvement Board also endorsed this work at its 17 May 2011 meeting.

Modernisation of EU procurement rules

5. LG Group has undertaken significant consultation on this topic:
 - 5.1 detailed feedback from 141 local authority procurement managers via a recent LG Group survey (Dec 2010)
 - 5.2 a consultation event in Brighton attended by over 50 procurement managers (Nov 2010)
 - 5.3 close engagement with the society of procurement officers (SOPO), experts from the sector, and procurement advisors from Local Partnerships and LGID.
6. The feedback shows that the legislation in its current form is too detailed and complex. Much time and resources are being spent by procurement managers to follow the rules, yet almost no contracts are finally awarded to suppliers based abroad. A more proportionate approach from the EU is required.
7. LG Group has also:

2 June 2011

Item 4

- 7.1 produced a series of case studies outlining costs and burdens associated with EU procurement rules
 - 7.2 introduced relevant EU case law into the 'shared services' guidance recently published as part of the Group's 'productivity' work
 - 7.3 brought local authority procurement experts to Brussels to give evidence to an EU hearing (Nov 2010, May 2011)
 - 7.4 had early meetings with those responsible for drafting the legislation in the European Commission, engaged with MEPs, as well as those responsible in Whitehall
 - 7.5 chaired the responsible local authority working group at EU level to ensure LGAs from across the EU are promoting common messages.
8. Cllrs Wilcox and Parsons have recently secured amendments on this topic via the Committee of the Regions. The amendments push for a more streamlined EU procurement regime and ensure that local and regional governments EU-wide call for:
- 8.1 certain services such as health and social services to remain excluded from the principal requirements of the Directive
 - 8.2 simpler procedures when awarding contracts, including greater use of negotiation between the public authority and the provider
 - 8.3 significantly higher financial thresholds before the EU rules become applicable.

LG Group response to Green Paper

9. Based on feedback received, the Group has submitted a response to an EU Green Paper consultation exercise on procurement modernisation which closed 18 April 2011 (summary in **attached** Annex). It was agreed via email by office holders of the European & International Programme Board and of the Improvement Board in April.
10. The response suggests that more coherent, consistent and above all significantly simplified EU legislation is required, in line with council's needs to make efficiency savings.

Developing key lobbying messages

11. Members are asked to discuss the issues highlighted by our member authorities within the LG Group response, the main elements of which are highlighted below, and to consider any further issues which should be incorporated into our lobbying:

2 June 2011

Item 4

- 11.1 significant overall simplification of the regime (reformed award procedures leading to greater use of negotiation with suppliers, more flexibilities around selection and award criteria, higher thresholds)
- 11.2 clear exclusion for public-public cooperation contracts in the new Directive which would free up councils to share services between each other without going out to tender
- 11.3 reduction of legal uncertainties and legal challenges from failed bidders
- 11.4 significant raising of thresholds to a level which makes cross-border competition economically viable for the supplier, and justifies the time spent on the procurement procedure by the public authority
- 11.5 criteria in public contracts relating to environmental benefits, innovation, SME promotion and social responsibilities should be the decision of national governments and individual councils. The EU should encourage but not mandate such practices. The main aim of procurement must continue to be a focus on best value.

Next steps

- 12. Members are also asked to endorse the next steps:
 - 12.1 LG Group continues a close dialogue with those responsible in Whitehall including CLG, the Office of Government Commerce (OGC), and the Cabinet Office (CO) Efficiency and Reform Group (ERG)
 - 12.2 address EU procurement concerns through a specific workshop at the LG Group annual conference in June
 - 12.3 the Group via the Brussels Office promotes its key messages to the EU
 - 12.4 the Group continues its work with the Committee of the Regions and via the Council of European Municipalities and Regions (CEMR).

Annex – Modernisation of EU procurement rules

Summary of LG Group initial response to EU

1. This paper is the Local Government Group's response to the European Commission's initial consultation on the future modernisation of EU Public Procurement Directives 2004/18/EC and 2004/17/EC.
2. The response has been produced in collaboration with Local Government Improvement and Development (LGID) and Local Partnerships (LP): the two UK organisations who advise local authorities on procurement matters.
3. In our response we answer a selection of questions from the Green Paper particularly relevant to local government.
4. The LG Group welcomes the European Commission's initiative to review the Directives governing public procurement, recognising the need for increased efficiency and effectiveness of the public procurement system. Such aims are consistent with the pressing need to enable savings in public finances.
5. Whilst the LG Group supports the idea of a certain element of coordination at EU level as regards public procurement activities, the legislation in its current form is too detailed and complex. It is not achieving its stated aim of promoting EU-wide competition and has several other short-comings.
6. Overall the review should result in more coherent, consistent and above all **significantly simplified legislation** in line with, and not going beyond, the EU's international commitments under the WTO Government Procurement Agreement (GPA).
7. The primary objective should be that Directive 2004/18 in its future format will simply implement the EU's international obligations to ensure a basic level of fair competition in line with Treaty principles and not over-regulate or micro-manage procurement arrangements within the member states.
8. Additional provisions in the Directive beyond international commitments should be included only when absolutely essential to ensure respect of the Treaties, ECJ case law, or current practices within member states.
9. A recent LG Group survey¹ among 141 local authority procurement managers in England and Wales together with findings from previous consultations enables us to identify aspects of Directive 2004/18 which are particularly difficult or costly to

¹ <http://www.lga.gov.uk/lga/procurement-consultation>

Item 4

implement, while also outlining recommendations for change in the future. Evidence used in this response is based on the results of this survey.

10. Our response does not attempt to answer each of the 114 questions the Commission asks in its Green Paper but instead focuses on the issues most relevant to local authorities:

1. Cost and efficiency
2. Public-public cooperation
3. Thresholds & A/B services
4. Award procedures
5. Procurement as a policy tool
6. Service Concessions
7. Procurement expertise & access to information
8. Remedies Directive (not part of the EU's review)
9. Other issues

Cost and efficiency

11. 66% of procurement managers agree that despite benefits of increased competition, the Directive (2004/18) has brought increased procurement process costs and administrative burdens, creating a more complex procurement process overall.

12. Recommendation: EU procedural and administrative requirements, particularly detailed award procedures, must be reduced by simplifying the Directive and increasing flexibility for local authorities. The focus at EU level should be to ensure the Treaty principles of equality, transparency and non-discrimination are respected, but not going beyond that.

Public-public cooperation

13. Legal uncertainty around pooling or sharing services between public authorities is the single biggest issue. It has been identified by 64% of procurement managers as an obstacle to sound procurement practice. It hampers the efficiency drive in the public sector and adds to local authorities' legal costs.

14. Recommendation: Administrative reorganisations within the public sector and contracts between contracting authorities should be clearly excluded from the scope of the Directive in line with current practices in member states and recent Court rulings.²

Thresholds & A/B services

15. The current financial thresholds are significantly beneath levels at which cross-border competition becomes viable. The situation is therefore one where many local

² Case C480/06 *Commission v Germany* ('Hamburg' judgement) 2009.

Item 4

authority contracts are awarded following an EU procedure, but only 1% of authorities 'sometimes' actually award a contract to EU suppliers without a UK base.

16. Recommendation: The thresholds need to be raised significantly to a level which makes cross-border competition economically viable for the supplier, and justifies the time spent on the procurement procedure by the public authority. International commitments should be renegotiated if necessary.

The distinction between 'part A' and 'part B' services should remain. In particular part B services such as health and social services must remain excluded from the principal requirements of the Directive.

Award procedures

17. Procedural requirements are complex and costly for bidders and contracting authorities alike, particularly the competitive dialogue procedure. In addition, it does not appear to be used consistently across member states.

18. Recommendation: The aim should be to ensure that local authorities can negotiate draft contracts with participants in the procurement phase without undue constraint through detailed procedural requirements. The revision should consider how to reduce costs and timescales involved in all award processes by simplifying or removing award procedure requirements, and introducing a greater ability to freely negotiate contracts. This may require replacing current award procedures with a new standard negotiated procedure. Public procurement laws need to be enforced equally across member states.

Procurement as a policy tool

19. Local authorities fully support environmental and social improvement but are concerned about EU efforts to use procurement to address such policy goals via their inclusion as award criteria in public contracts.

20. Recommendation: The EU regime already allows for full consideration of these 'non-economic' policy requirements in public procurements. EU requirements to include green, social, or other policy criteria in procurements must remain voluntary to allow local authorities to focus on best-value. Member States should be encouraged to support eco-friendly and responsible procurement practices. There is also a need for guidance on how local policy priorities such as supporting local businesses and promoting local employment can be included in award criteria whilst working within the scope of the Directives and the Treaty.

Service Concessions

21. Our evidence suggests 21% of local authorities have awarded at least one contract as a service concession, often following an EU compliant competitive

Item 4

tendering procedure 'just to be sure' despite there currently being no requirement at EU level to do so.

22. Recommendation: There is no need for any new EU regulation governing service concessions. If there must be EU proposals on service concessions they should continue to exclude such arrangements from EU award procedures, and should not go beyond a basic prior advertising requirement to ensure transparency. Concessions should be considered as part of the review of Directive 2004/18 and not as a separate directive which would add further to the complex legal framework governing public procurement.

Procurement expertise & access to guidance

23. Whilst the general level of expertise seemed high among our survey respondents, we believe the level of expertise across local authorities as a whole varies significantly.

24. Regarding access to information such as guidance, 46% of procurement managers stated that while they know where to find relevant information it is often hard to access or that insufficient information is provided.

25. Recommendation: Guidance on specific areas of procurement alongside professional capacity building is needed. The EU should set up and promote web-based tools for structured knowledge sharing, training, and for the promotion of models of good practice. Initiatives such as the PROGRESS programme supporting procurement capacity building should be enhanced.

Remedies Directive (not part of EU review)

26. The rising risk of legal challenge and the perceived legal bias in favour of the supplier is leading to cautious, risk averse procurement practice, stifling innovation and reducing cashable savings. Local authorities are also facing increased legal costs to deal with actual and potential challenges at times of financial cutbacks.

27. Recommendation: the Remedies Directive must be reviewed to make clear under which circumstances local authorities can be challenged. Such a determination should not be left to varied interpretation by the courts. Under the Directive, unsuccessful bidders should require stronger grounds to challenge the legitimate award of a public contract.

Other issues

28. The full response³ deals with a range of other issues: smaller contracting authorities, collaborative purchasing/demand aggregation, SME policies, sub-

³ <http://www.lga.gov.uk/lga/core/page.do?pagelid=18013723>

2 June 2011

Item 4

threshold contracts, subcontracting, major changes to contract, favouring local suppliers, language requirements and quality standards in social services.